FILE COPY

FILED
APR 10 1961
JAMES R. BROWNING, Clerk

No. 791

In the Supreme Court of the United States

OCTOBER TERM, 1960

W. B. HERRON, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO DISMISS

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, JR.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
ROBERT E. POWELL,
Attorneys,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 791

W. B. HERRON, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of this Court, the United States moves that the appeal from the judgment of the United States District Court for the District of Oregon be dismissed.

OPINION BELOW

The Opinion and Order of the district court (J.S. 13-16)[1] is not reported.

---

[1] "J.S." refers to the Jurisdictional Statement of appellant.

JURISDICTION

The judgment of the single judge district court was entered on October 14, 1960. Notice of appeal to this Court was filed on November 12, 1960. The time within which to docket the appeal was enlarged by the district court to and including March 6, 1961. Appellant seeks to invoke the jurisdiction of this Court under "* * * the securities, grants, liberties and guarantees as specifically set forth in the Federal Bill of Rights * * *."

QUESTION PRESENTED

Whether, in an action to recover damages from the United States for the alleged wrongful acts of three district judges performed within the scope of their judicial offices, this Court has jurisdiction to entertain an appeal from a judgment of a single judge district court which dismissed the complaint on the grounds (1) that the United States had not consented to be sued; (2) that federal judges are not subject to the control of the Executive; and (3) that no jurisdiction is conferred upon a district court to hear claims based upon an act of a federal judge performed within the scope of his office.

STATEMENT

This is an action brought by appellant against the United States based upon the alleged wrongful acts of United States District Judges William G. East, Gus J. Solomon and John F. Kilkenny, performed within the scope of their judicial offices (R. 1-8).

The claims grow out of the proceedings in another case in the District Court for the District of Oregon, *Herron* v. *Millers National Insurance Co.*, Civil No. 7995, in which, on July 25, 1958, Judge East found appellant in contempt of court after appellant repeatedly refused to comply with orders of the court to take the witness stand (R. 4). Appellant was sentenced to ten days imprisonment for the contempt and was taken into custody by the United States Marshal (R. 4-5). Thereafter, appellant sought a writ of prohibition and mandamus from the Court of Appeals for the Ninth Circuit, which was denied. The order of that court is not reported. Appellant filed a petition for a writ of certiorari in this Court seeking review of the order of the Court of Appeals. The petition was denied. *Herron* v. *United States District Court for the District of Oregon*, 364 U.S. 891.

On July 22, 1960, appellant filed the complaint in the present case alleging that, by reason of the treatment accorded him by Judge East and by the United States Marshal, he had been deprived of his rights under the Fourth through Tenth Amendments to the Constitution, especially the Fifth, and the Fourteenth Amendment (R. 1-9). On September 19, 1960, the Government filed a motion to quash service and to dismiss on the grounds that the complaint failed to state a cause of action against the United States, and that the complaint sought relief sounding in tort on a claim expressly excepted from the scope of the Federal Tort Claims Act, 28 U.S.C. 2680(h) (R. 12). On October 14, 1960, Chief Judge Chase A. Clark of

the District Court for the District of Idaho, sitting by special assignment, dismissed appellant's complaint (J.S. 15). The court held: (1) that the United States had not consented to suit on claims of this character; (2) that federal judges are not subject to the control of the Executive; and (3) that no jurisdiction is conferred upon district courts to hear claims arising out of acts performed by federal judges in the scope of their judicial office (J.S. 14-15).

ARGUMENT

The appeal should be dismissed. This Court's appellate jurisdiction over decisions of single judge district courts in civil suits is limited to instances where, unlike the situation here, an Act of Congress has been held unconstitutional, 28 U.S.C. 1252.

CONCLUSION

For the foregoing reason, we respectfully submit that this appeal should be dismissed.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ALAN S. ROSENTHAL,
ROBERT E. POWELL,
Attorneys.

MARCH 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 590022 1138